Supreme Court, U.S.
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No. 91-2071

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CHILDREN'S HOUSE,

Petitioner,

v.

LEE FISHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, The Children's House, timely made application to the Ohio Attorney General for 1988 and 1989 charitable bingo licenses, pursuant to Ohio Revised Code (hereinafter O.R.C.) §2915.08. By letter dated March 10, 1989 from Scott Lavelle, then Chief of the Attorney General's Charitable Foundations Section, the Attorney General informed The Children's House of his intention to reject its bingo license application. The notice letter informed The Children's House of its right to request a hearing pursuant to O.R.C. §119.06. The Children's House requested a hearing, and hearing was subsequently held before an independent hearing examiner appointed by the Attorney General. Following the hearing, written arguments were submitted by counsel for The Children's House and by the Attorney General to the hearing examiner. The Report and Recommendation[1] of the hearing

[1] The Hearing Examiner's Report and Recommendation and the Attorney General's Adjudication Order were not included in Petitioner's Appendix. They are reproduced at A-1 and A-9.

examiner concluding that the application should be rejected was issued on June 27, 1989. The Children's House filed Objections to the Report and Recommendation.

The hearing examiner's Report and Recommendation, together with the Objections of The Children's House, were submitted to Loren Braverman, Deputy Chief Counsel for the Attorney General, for adjudication. Mr. Braverman had no official involvement with the Attorney General's investigation of The Children's House and the proposed rejection of its bingo license application prior to the submission of these materials. Mr. Braverman subsequently issued the adjudication order on behalf of the Attorney General, rejecting the bingo license application of The Children's House on the grounds that the Children's House was not a charitable organization[2] and that it had violated specific statutory provisions by the payment of bingo game operators, payment of excessive rent, and submission of false information to the Attorney General.

The Children's House subsequently appealed the adjudication order to the Clermont County Court of Common Pleas, which found the Order of the Attorney General to be supported by reliable, probative, and substantial evidence and in accordance with law, and that the claims of unconstitutionality advanced by The Children's House were invalid.

The Children's House appealed this judgment to the Court of Appeals of Ohio, Twelfth Appellate District. The Court of Appeals found that all of the Attorney General's findings were supported by reliable, probative, and substantial evidence and were in accordance with law, and that the Court of Common Pleas had not abused its discretion in upholding the order of the Attorney General. The Court also found that

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[2] Although Petitioner indicates that it "vigorously denied" the accusations "and contested them both before the examiner and in the courts," it stipulated to the facts underlying the determination that it was not a "charitable organization." Petitioner also waived oral argument before the Ohio Supreme Court.

there was no denial of due process in the administrative procedures used in processing bingo license applications.

A notice of appeal to the Ohio Supreme Court was filed by The Children's House. The Ohio Supreme Court granted the motion to certify the record. *Children's House v. Celebrezze*, 60 Ohio St. 3d 719, 574 N.E.2d 1083 (1991). After submission of briefs by the parties and oral argument on behalf of the Attorney General before the Court, the Ohio Supreme Court dismissed the appeal, *sua sponte*, as having been improvidently allowed. *Children's House v. Celebrezze*, 63 Ohio St. 3d 1206, 587 N.E.2d 301 (1992).

SUMMARY OF ARGUMENT

The questions presented by the petition are neither novel nor of sufficient importance to warrant this Court's attention. The legal issues raised can be easily resolved by application of this Court's own prior controlling decisions to the fact situation herein. Further, the decisions below are correct and ultimately fair to petitioner.

ARGUMENT

Petitioner alleges that its question as to whether a license issued pursuant to state statute gives rise to a constitutionally protected property interest is an important question of federal law that this Court has not but should settle. The fact that the question has not been resolved by the Supreme Court, standing alone, is not a recognized basis for the grant of certiorari. In the present case, there is no need for the Court to reach this issue. Even should the Attorney General concede, for purposes of argument, that such a license does give rise to a protected property interest, petitioner was afforded all process due by the opportunity for a pre-adjudication hearing and subsequent judicial review.

It is arguable that Ohio has interpreted the bingo licensing statute and the administrative procedure act to recognize a property interest in a bingo license, so there is no need for this Court to address the issue. In *Boys Town v. Brown*

(1982), 62 Ohio St. 2d 1, 429 N.E.2d 1171, the Ohio Supreme Court held that charities are entitled to a pre-adjudication hearing, pursuant to O.R.C. 119.06, before an application for renewal of a charitable bingo license may be rejected by the Attorney General. This is a matter of state statute and the interpretation of those statutes by Ohio courts. Accordingly, it is unnecessary for the court to reach this question.

Under any standard, petitioner was afforded all process due in the administrative hearing process and upon judicial review. Determination of petitioner's question as to whether the statutory bingo licensing scheme employed in Ohio violates the due process clause of the Fourteenth Amendment to the United States Constitution requires only the application of this Court's own prior controlling decisions to the facts of this case. This Court is well familiar with the requirements of *Withrow v. Larkin*, 421 U.S. 35 (1975), and petitioner's question presents no novel issue that requires this Court to accept jurisdiction for application of the principles of *Withrow* to this action.

Petitioner has further alleged that the combination of investigative, prosecutorial, and adjudicative functions in the Attorney General constitutes a denial of a fair and impartial hearing. However, statutes which place such a combination of functions in one administrative agency have been found to be constitutional. *Hortonville J.S.D. No. 1 v. Hortonville Ed.*, 426 U.S. 482 (1976); *Withrow v. Larkin, supra.* As this Court noted in *Withrow:*

> It is not surprising, therefore, to find that '[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process. . . .' 2 K. Davis, Administrative Law Treatise §13.02, p. 175 (1958). Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating.

421 U.S. at 52.

Petitioner has attempted to distinguish *Withrow* by making the inference that the Attorney General, as an individual, makes the decision to reject the license application and subsequently reviews his own decision. This is not an accurate representation of the procedure. The Ohio administrative process is structured in such a way that there is no "decision", that is, no adjudication order until after the pre-adjudication hearing. O.R.C. 119.06. Subsequent to the issuance of the adjudication order, the Attorney General cannot review his own decision, as review is available only upon appeal to the courts.

Further, contrary to the implications contained in the petition, the procedures actually employed by the Attorney General in the administrative process are such that there are different levels of determination in the process and no individual participates in a determination at more than one level. In this case, the investigation of a bingo license applicant is initiated and supervised by an Assistant Attorney General in the Charitable Foundations Section. An attorney's decision to reject an application is then reviewed by the Chief of the Charitable Foundations Section and the Attorney General's Chief Counsel. If approved, the notice of intent to reject the application is issued by the Chief of the Charitable Foundations Section. If a hearing is requested, the hearing is held before a hearing examiner appointed by the Attorney General. The hearing examiner is not an employee of the Attorney General but is an independent contractor engaged in the private practice of law. Indeed, the Court of Appeals for the Twelfth Appellate District of Ohio specifically found that the administrative hearing in this action was conducted before an independent hearing officer. Finally, the report and recommendation of the hearing officer and any objections filed thereto are reviewed by a Deputy Chief Counsel with no prior official involvement in the case. This Deputy Chief Counsel then issues the adjudication order on behalf of the Attorney General.

The Attorney General's action rejecting the bingo license application of The Children's House was subjected to three levels of judicial appellate review. The fact that the process afforded The Children's House was fair is conclusively demonstrated by the findings of each court on appeal that the adjudication order of the Attorney General was supported by reliable, probative, and substantial evidence and was in accordance with law. The appellate review process determined that The Children's House applied for a bingo license without qualifying as a charitable organization, that it violated statutory provisions by the payment of bingo workers and payment of excessive rent and by presenting false information to the Attorney General relating to its bingo application. The decisions of the courts below are correct.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL OF RECORD

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
CHARITABLE FOUNDATIONS SECTION

IN THE MATTER OF:	:	Hearing Officer
	:	John L. Tanoury
THE CHILDREN'S HOUSE	:	

REPORT AND RECOMMENDATION

This matter came on for hearing pursuant to Applicant's request for the same. By letter dated March 10, 1989, the Attorney General informed Applicant of its proposed intention to reject Applicant's 1989 bingo license application. The reasons for this proposed action were stated as follows:

1. Applicant is not a "charitable organization" as defined in R.C. 2915.02(H). Specifically, applicant is not, and has not received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), and 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code. The determination letter submitted by applicant is not currently in effect because applicant no longer exists as a corporate entity in the State of Ohio.

2. Applicant has paid compensation to bingo game operators Rosanna Stephenson, Richard Nichting, Carol Sue Bell, Kathy Gee, Marilyn Schroer, and Edith Reardon, in violation of R.C. 2915.09(B)(1).

3. Applicant has paid rent in excess of $250 per bingo session and applicant has paid a rental rate that is more than is customary and reasonable for the premises that are similar in location, size, and quality, in violation of R.C. 2915.09(A)(3).

4. Applicant has made incorrect or false statements material to the granting of the bingo license in its application, in violation of R.C. 2915.08(B)(2)(b). Specifically, due to the payments made to bingo game operators, applicant has failed to include all bingo proceeds on its income statement and has also failed to include all bingo expenses on its expense statement, in violation of O.A.C. 109:1-3-02(C)(4) and 109:1-3-02(C)(5)(d) and (i).

5. Applicant has submitted incorrect or false information relating to an application which is material to the granting of the license, in violation of R.C. 2915.08(B)(2)(c). Specifically, applicant has submitted copies of an IRS determination letter that is not currently in effect and articles of incorporation that have expired as a matter of law, in violation of O.A.C. 109:1-3-02(E)(2),(6) and (7).

6. Applicant has failed to provide the names and addresses of all principal partners, trustees, directors or officers of the lessor, in violation of O.A.C. 109:1-3-02(B)(3)(d)(vi).

7. The Attorney General has good cause to believe applicant will not conduct its bingo games in accordance with R.C. 2915.07 to 2915.12, for the reasons set forth above.

Applicant timely requested a hearing and the hearing was conducted on May 24, 1989. The decision will discuss the various grounds separately.

APPLICANT HAS PAID COMPENSATION TO BINGO GAME OPERATORS IN VIOLATION OF R.C. 2715.01(B)(1)

The unchallenged, overwhelming and unrebutted testimony presented at the hearing demonstrated that four of the Applicant's bingo game operators were paid cash for working the bingo games. They were paid after each session they worked and they were paid in a manner so as to avoid

detection. There is no question from the testimony presented that Richard Nichting, Carol Sue Bell, Rosanna Stephenson, and Kathy Gee were hired to work the bingo games by the person in charge of Applicant's game Louise Schroer. (Tr. pg. 11-12, 28, 39, 52). There is no question that Louise Schroer told them they would be paid. While Louise Schroer was clandestine in her method of payment, there is little doubt that she was in fact paying these bingo game operators.

In spite of the signed statements from each of these operators that they received payment from Louise Schroer, and that Louise Schroer told them they would be paid for working bingo, Applicant has continued to allow Louise Schroer to run its bingo games. Applicant has chosen to ignore the statement's and testimony of five bingo game workers stating that Louise Schroer paid them for working bingo games.

In light of the overwhelming testimony of illegal payments and the total lack of action by the Applicant to remove Louise Schroer as the operator of the bingo game sessions, doubt exists as to the purpose and true beneficiary of Applicant's bingo game.

Applicant, dispite the fact that Louise Schroer was available and still operating its bingo game did not present her as a witness in this hearing. It is almost beyond comprehension that Applicant would not present its person in charge of bingo to rebut the testimony of illegal payments.

Applicant's argument that since Louise Schroer was not an officer, employee or director of the organization any alleged acts by her cannot be imputed to the organization is without merit as it relates to this litigation. Applicant has stated in its application that Louise Schroer is the person it selected to run the bingo games. Applicant cannot now argue that illegalities by its hand chosen operator are not imputable to it.

To hold that an organization is not liable for illegalities in bingo games conducted by the organization unless a

current director, employee or officer commits them would allow for rampant disregard of the regulations without penalty. All an organization would need to do is select a non-member to run its game.

Assuming Applicant had no knowledge of the blatant illegal payments it is still responsible for the illegalities conducted at a bingo game conducted under its license.

Patricia Campbell testified at his hearing. She testified that for approximately 4-1/2 years she has been president of the Board of Directors. She testified that she hasn't missed a Board meeting during this period. (Tr. 109-111). Yet, she had no idea how long Louise Schroer had been running the bingo game. She stated that Schroer was there when she started. She also testified that during her tenure the records of the Board were in dissaray. She stated that she relied solely on a former employee to handle these matters and that employee messed up.

Ms. Campbell had little knowlege of Applicant's lease arrangements. She had no involvement with its negotiation. She couldn't explain the different lease submitted to the Attorney General. She didn't know who paid utilities.

Basically, she presented a picture of a person with little or no knowlege of major Board matters. Clearly, the circumstances surrounding the operator of the bingo game, and the lack of control by the Board president presents a picture of an organization happy to recieve whatever money this Bingo game operator bestows upon them.

The testimony presented clearly shows that the Applicant's chosen bingo game operator paid people for working at the bingo games.

The evidence presented shows that this was done with knowledge of its illegality and that Applicant has, despite these illegal payments, continued to allow Louise Schroer to run its bingo games.

Based upon this evidence alone rejection of the 1989 license was appropriate.

APPLICANT IS NOT A CHARITABLE ORGANIZATION AS DEFINED IN R.C. 2915.01(H)

R.C. 2915.01(H) provides as follows;

> "Charitable organization" means any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, volunteer firemen's, senior citizen's, youth athletic, or youth atheletic park organization. An organization is tax exempt if the organization is, and has received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10) or 501(c)(19) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer firemen's organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding . . . the making of an application for a bingo license under section 2915.08 of the Revised Code . . .

Applicant, the Children's House, was created in August, 1972 by the filing of Articles of Incorporation with the Ohio Secretary of State. Applicant subsequently applied to the Internal Revenue Service for exempt status, and was issued a determination letter on April 27, 1973, recognizing The Children's House as a 501(c)(3) organization. The determination letter issued by the Internal Revenue Service was issued to The Children's House as a corporate entity.

At hearing, the Attorney General presented, as Exhibit J, a document from the Ohio Secretary of State indicating that the Articles of Incorporation of The Children's House were cancelled on October 2, 1983.

Internal Revenue Service Regulation 1.501(a)(1) provides that an organization that has been determined to be tax exempt may rely on that determination so long as there are no substantial changes in the organization's method of operation.

Applicant's method of operation did in fact undergo a substantial change in its method of operation when it failed to continue its operation as a corporation in Ohio.

Revenue Ruling 67-390 details organizational changes that would necessitate the securing of a new tax exempt determination. The examples are by way of illustration and not all inclusive. The four changes cited as examples are:

> Case 1. An exempt trust was reorganized and adopted a corporate form to carry out the same purposes for which the trust had been established. Its operations were not changed.
>
> Case 2. An exempt unincorporated association was incorporated and continued the operations which had qualified it for exemption.
>
> Case 3. An exempt organization incorporated under state law was reincorporated by an Act of Congress to carry out the same purposes containe din the state charter.
>
> Case 4. An exempt organization incorporated under the laws of one state was reincorporated under the laws of another state with no change in its purposes.

Applicant's failure to maintain its corporate structure required it to obtain a new tax exempt determination letter. Once the structural changes took place its previous tax exemption letter was no longer current.

There is nothing in the Revised Code that requires the Attorney General to blindly accept a tax exemption letter

that it has reason to believe is no longer applicable due to structural changes in the organization.

Were this the only reason offered by the Attorney General for rejecting Applicant's 1989 application this Examiner might be of the opinion that neglect of filings, unawareness of requirements and obvious lack of monitoring should result in a less stringent result.

However, the same reason that led to Applicant losing its corporate status (lack of any real oversight and control), permeates this organization. It is seen in Applicant's submission of fraudulent leases without any awareness, its lack of actions against its bingo operator despite overwhelming evidence of illegal activity, its unawareness of lease obligations and responsibilities, and its admission that leases, Bingo Applications and the like were simply signed without any real inquiry as to the particulars.

Given, Appellant's loss of its corporate identity it was required to obtain a new tax exempt determination. Its failure to do so renders the Attorney General's proposed action reasonable.

APPLICANT HAS PAID RENT IN EXCESS OF $250 PER BINGO SESSION

The testimony presented by Applicant's witnesses demonstrates a total lack of knowledge by the Board as to details of its lease arrangements. It demonstrated that this organization clearly lacks a recognition of its responsibilities, at least as they relate to operating a bingo game.

As to the payment of rent in excess of $250 per session, Applicant's Board president admitted that the reason for entering a "second" lease for the bingo hall was to get around the restriction in law that no more than $250 per bingo session could be paid in rent. (Tr. p. 125-126).

In fact this was about the only detail she new about as it related to the leases.

Based upon the testimony and the leases submitted into evidence it is clear that Applicant entered into leases which resulted in paying in excess of $250 per bingo session.

The remaining allegation in the Attorney General's notice are cumulative, in that the incorrect and false filings are premised on the conclusion reached regarding the first 3 allegations. In light of my determination on the first 3 allegations, it is my finding that Applicant filed false, incomplete and misleading statements in its bingo application.

CONCLUSION

Based upon the foregoing discussion, review of the testimony and evidence it is my recommendation that Applicant's 1989 bingo license application be rejected. The picture that the tesimony and evidence clearly presented was one of an organization that buries its head in the sand when it comes to its responsibilities under the bingo laws and its content to receive whatever money bingo makes without regard to the manner of its operation.

_____

John L. Tanoury
Hearing Examiner

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Report and Recommendation has been served upon William Scott Lavelle, Chief, Charitable Foundations Section, 30 East Broad Street, Columbus, Ohio 43266-0344, and copies sent to John K. Everett, Lumpe and Everett, 37 West Broad Street, Suite 730, Columbus, Ohio 43215 and Monica A. Maloney, Assistant Attorney General, 1680 State Office Tower, 30 E. Broad Street, Columbus, Ohio 43266-0410 by first class, U.S. Mail, postage prepaid, this day of June, 1989.

_____

John L. Tanoury

IN RE: APPLICATION FOR A 1989 CHARITABLE BINGO LICENSE OF THE CHILDREN'S HOUSE

The matter of the application of the Children's House for a 1989 charitable bingo license, after timely notice and request for a hearing, was heard before John L. Tanoury, a duly authorized hearing officer. The hearing examiner issued and served his report and recommendation on May 24, 1989. Objections to the report and recommendation were timely filed by counsel for the Children's House.

Upon consideration of the record and the report and recommendation of the hearing examiner, and the objections filed by the Children's House, the Attorney General concludes that the Children's House is not a charitable organization as defined in R.C. 2915.02(H); has paid compensation to bingo game operators in violation of R.C. 2915.09(B)(1); has paid rent in excess of $250 and has paid a rental rate that is more than is customary and reasonable for premises which are similar in location, size and quality, in violation of R.C. 2915.09(A)(3)(b); has made incorrect or false statements material to the granting of a bingo license in its application, in violation of R.C. 2915.09(B)(2)(b); has submitted incorrect or false statements relating to an application which is material to the granting of a license, in violation of R.C. 2915.09(B)(2)(c); and that the Attorney General has good cause to believe the Children's House will not conduct its bingo games in accordance with R.C. 2915.07 to R.C. 2915.12. Therefore, the Children's House is not entitled to a charitable bingo license.

The Attorney General, accordingly, adopts the hearing examiner's recommendation that the 1989 bingo license application of the Children's House be denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the application of the Children's House for a 1989 charitable bingo license is hereby rejected.

By Order of the Ohio
Attorney General
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